

*United States Court of Appeals
for the Second Circuit*



**BRIEF FOR
APPELLEE**

3 PLS
74-1146

To be argued by
JAMES P. LAVIN

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 74-1146

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT MAHER,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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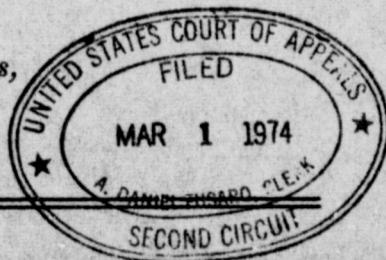




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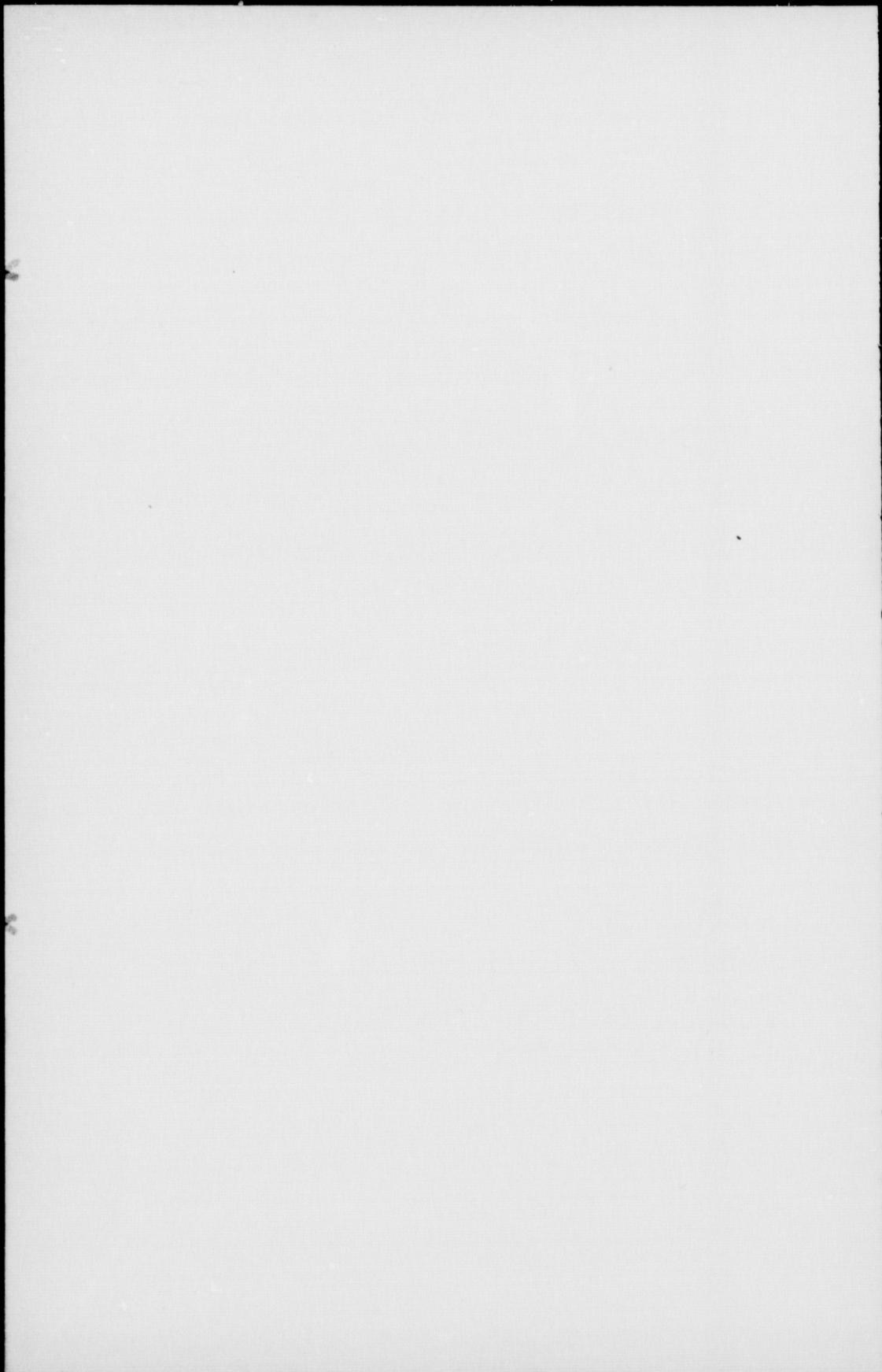
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FOR THE SECOND CIRCUIT

Docket No. 74-1146

UNITED STATES OF AMERICA,

Appellee,

—v.—

ROBERT MAHER,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Robert Maher appeals from a judgment of conviction entered in the United States District Court for the Southern District of New York on December 18, 1973 after a four day trial before the Honorable Lloyd F. MacMahon, United States District Judge, and a jury.

Indictment 73 Cr. 970, in five counts, was filed on October 17, 1973 and unsealed six days later. Count One charged the defendants Robert Maher, Angelo Trabacchi, Eligio Matos and Charles Dancil with conspiracy to violate the federal narcotics laws (Title 21, United States Code, former Sections 173, 174 and present Section 846).* Counts Two through Five charged substantive violations of Sections

* At trial, the court required the Government to make an election between sections 174 and 846. The Government chose to proceed on the conspiracy count under section 174.

173 and 174. Count Two charged Trabacchi and Maher with selling approximately one kilogram of heroin in or about October of 1969. Count Three charged Trabacchi and Maher with another sale of one kilogram of heroin in or about November of 1969. Count Four charged the defendant Maher alone with selling two kilograms of heroin in February of 1971 and Count Five charged him with the sale of one kilogram of heroin in March of 1971.

Trial commenced against defendants Maher and Trabacchi on November 12, 1973 and concluded on November 15, 1973, when the jury convicted Maher on Counts Four and Five.* The jury was unable to reach a verdict as to the defendant Trabacchi on any count, nor as to Maher on Counts One, Two and Three, Judge MacMahon declared a mistrial on the unresolved counts against each defendant.

On December 18, 1973 Judge MacMahon sentenced Maher to ten years imprisonment and a \$5,000 committed fine on each of Counts Four and Five, the sentences to run concurrently. Maher was remanded and is presently serving his sentence.

Statement of Facts

The Government's Case

Doris Torres Olivero, the Government's principal witness at trial, testified that in February of 1967 she met and subsequently began living with Santiago Olivero, whose name she assumed. Both were heroin addicts and were engaged in selling narcotics. On one occasion during the winter of 1968 the two of them drove to Manhattan Beer Distributors on First Avenue between 109th and 110th Streets in New York City. When they arrived Santiago got out of the car and was observed by Doris

* The defendants Matos and Dancil were fugitives at the time of trial.

meeting with the defendant Angelo Trabacchi. Trabacchi and Santiago entered Manhattan Beer Distributors and a short time later Santiago came out of the store carrying a case of beer which he placed in the trunk of his car. He and Doris then drove to Brooklyn where Santiago removed the case of beer from the trunk and took it upstairs to their apartment. Santiago opened the case and removed from a space where a bottle of beer should have been, a plastic package containing a half or full kilogram of heroin which Doris and Santiago tested by injecting themselves.

Doris Olivero testified that she and Santiago returned to Manhattan Beer Distributors about a week or two later and at this time she was introduced to Trabacchi as Santiago Olivero's wife. Following the procedure established on the first trip, Doris remained in the car while Santiago obtained a case of beer from Trabacchi's store and placed it in the trunk of his car. They then drove to their Brooklyn apartment, took the half kilogram of heroin which was concealed in the case of beer upstairs where it was weighed and, again by self-injection, tested. The heroin was then rebagged into smaller quantities for sale to Santiago's customers.

Doris and Santiago Olivero returned to the Manhattan Beer Distributors on four or five subsequent occasions. On each visit Santiago would meet the defendant Trabacchi outside Manhattan Beer Distributors, enter the store with Trabacchi and come out alone carrying a case of beer. The case of beer on each occasion contained either a kilogram or half a kilogram of heroin. Doris Olivero also stated that on each of these excursions Santiago took along \$12,000-14,000 in cash to pay for the heroin. The cash was contained in a brown paper bag and prior to each delivery Doris would help Santiago count and package the money. After each pickup she and Santiago would return to their apartment where they would cut the heroin and rebag it for sale to Santiago Olivero's customers in \$100, \$300 and \$500

quantities. And as with the first two pickups, Doris and Santiago would test each package of heroin received from Trabacchi by injecting themselves (Tr. 92-104, 195-98).*

During one such heroin pickup, Doris saw the defendant Robert Maher in conversation with Trabacchi outside Manhattan Beer Distributors. Maher and Trabacchi, followed by Santiago, entered the store. When Santiago came out, he placed the beer case in the trunk of the car and then told Doris that "he had met the big man" (Tr. 105-08). Doris Olivero did not recall the exact date when she saw Maher but recalled that it was springtime of 1969 and that she was pregnant at the time (Tr. 108).

Shortly after Mrs. Olivero gave birth on September 22, 1969 she and Santiago went to Dan's Bar and Grill on 186th Street and Hughes Avenue in the Bronx. Inside the bar they met with defendants Maher and Trabacchi and Maher's brother. Santiago Olivero, Maher and Trabacchi went to the back of the bar and had a conversation which Doris was unable to overhear. When the three men returned to the table at which Doris was sitting, Trabacchi remarked to her that if he had known she had had a baby he would have sent some flowers to the hospital. Doris and Santiago then left the bar, and in the car on their way home, Santiago told Doris that he was now going to do business with Maher (Tr. 108-10).

A week or two after the meeting in the bar in the early fall of 1969, Santiago told Doris that he had to go to Pearl Street in lower Manhattan to meet with Maher who would be near a yellow crane which he operated. Doris testified that she and Santiago went to Pearl Street that night and after a few minutes wait Maher approached and entered

* References in the form "Tr." are to the stenographic transcript of the trial; references to "A. Br." are to appellant's brief; "App." refers to appellant's appendix and references "GX" are to the Government's exhibits in evidence.

Santiago's green Cadillac. Inside the car Maher handed Doris Olivero a box, stating that it was a present for her. Santiago then paid Maher approximately \$12,000-13,000 in cash. Both Doris and Santiago returned to Pearl Street about two weeks later, again at night. Because of the presence of police in the area, Doris and Santiago met Maher in the area of a nearby fish market where Maher delivered to Santiago a package of heroin which he had covered with a newspaper. Both of the packages of heroin picked up from Maher were later tested by Doris and Santiago by self-injection.

The employment records of the Underhill Construction Company showed that Maher was working as a crane operator on Underhill's Southbridge Construction site at Pearl Street in Manhattan during the period May 20, 1969 to December 29, 1969 (Tr. 402; GX 8).

Subsequent to these pickups on Pearl Street, Santiago informed Doris that Maher had changed locations and was now working in Brooklyn. One afternoon they drove to Brooklyn in an attempt to locate the address given by Maher and finally found him working at a construction site in Bay Ridge. No packages were exchanged at this time but a few days later they returned and met with Maher who sold a package of heroin to Santiago. During the transaction in Santiago's car Doris overheard a conversation between Maher and Santiago about the quality and price of the heroin (Tr. 113-115).

The Underhill Construction Company's records showed that Maher was working at the Bay Ridge Construction site in Brooklyn from August 25, 1970 to March 2, 1971 (Tr. 403; GX 9).

Again the meeting place was changed, this time to McLean Avenue in Yonkers. On the three or four occasions when they met with Maher at that location, Doris and

Santiago picked up packages of heroin which they later tested by personal use. Santiago would pay Maher from \$11,000 to \$14,000 for the packages and when there was not enough money Maher would tell Santiago to make up the shortage on another occasion (Tr. 115-118).

In November of 1970 Santiago was arrested by Agents of the Bureau of Narcotics and Dangerous Drugs (BNDD) as he was attempting to sell one-half kilogram of heroin to an undercover agent (Tr. 301-09). While visiting Santiago at the Federal House of Detention in West Street Doris was told by him to get rid of a quantity of heroin in their house at 88-20 Vanderveer Street, in Queens. But before she could do so, BNDD Agents, acting under a search warrant, entered the house and began a search. Doris led the agents to a closet where they seized a quantity of heroin (Tr. 119, 310-318). While Santiago was still in West Street in November of 1970, Doris received a phone call from Maher and she told him that Santiago had been arrested. Maher asked if she was going to bail Santiago out, further adding that if she needed anything she should let him know. Maher also told Doris that Santiago should call him as soon as he was released (Tr. 118-20).

Santiago Olivero was released on bail and in February of 1971 he and Doris flew to Puerto Rico. While they were there he told Doris to return to New York and sell one-half a kilogram of heroin to a customer. She was also to take \$10,000 and to pick up additional heroin from Maher, who was then working on Gunhill Road in the Bronx. After doing this she was to return to Puerto Rico. However, the customer did not want to deal with Doris so she was unable to sell the one-half kilogram of heroin. She also did not try to meet Maher because she did not know where Gunhill Road was (Tr. 119-22, 222-23).

When Santiago returned to New York from Puerto Rico he and Doris went to Gunhill Road, another construction site at which Maher was working. Doris testified that at the site Maher entered their car and had a conversation with Santiago about heroin. The next day Doris and Santiago returned to Gunhill Road bringing Maher money for some as yet undelivered heroin as he had instructed the previous day. Arrangements were then made to pick up the heroin the next day, but instead it was picked up from Maher that night, taken by Doris and Santiago to Brooklyn, tested, and stored in the basement of the Oliveros' house. The following day, March 23, 1971, Santiago and Doris returned to Gunhill Road to meet with Maher. Upon arrival, they, along with Maher, were arrested by officers of the New York City Police Department. After the arrest Doris Olivero took Detective John Rainey, one of the arresting officers, to her house in Brooklyn and she there showed him where the heroin, picked up from Maher the night before, was secreted.

Santiago Olivero was unable to post bail and remained in custody for about 30 days following his arrest. During one court appearance he told Doris that Maher was going to put up some of his bail money. Doris testified that she then went with Bernard Udell, an attorney then representing Santiago, to a bank where she waited outside while Udell entered carrying a briefcase. When he came out both he and Doris went to a bail bondsman to post Santiago Olivero's bail (Tr. 124-28).

After his release on bail in or about April of 1971, Santiago Olivero informed Doris that he was still dealing in narcotics with Maher (Tr. 128). In May of 1971 she and Santiago took another trip to Puerto Rico and while there Santiago told Doris to return to New York to pick up a kilogram of heroin which he had previously purchased from Maher. The heroin, which was hidden in their apartment, was to be brought back to Puerto Rico. Doris went

to New York, picked up the kilogram of heroin and delivered it to Santiago in Puerto Rico. Santiago, however, was unable to sell the narcotics and they decided to return to New York. At the airport, seeing that the passengers were being searched, Santiago instructed Doris to hold on to the heroin and stay in Puerto Rico another day while he flew back to New York. Doris returned to the hotel and hid the cosmetic case containing the heroin over a panel in the ceiling of her bedroom and returned to New York the next day. Santiago, angered by her leaving the heroin, ordered her to go back to retrieve it. Doris returned to Puerto Rico and on May 28, 1971 she was arrested by BNDD agents while attempting to remove the heroin from the hiding place in the ceiling. Doris Olivero further testified that she pled guilty to a violation of the federal narcotics laws and was presently serving a four year term of imprisonment on that charge (Tr. 128-31).

Carmen Berrerra testified that she was a girlfriend of Santiago Olivero during 1970 and 1971 and that in the fall of 1970 she went with Santiago to a construction site in Brooklyn where she was introduced by Santiago to the defendant Maher. Maher, in her presence, told Santiago to return later to pick up a package. She and Santiago later that same day returned to the site and met Maher who handed Santiago a package through the car window. Santiago later told Carmen Berrerra that the package contained dope. Shortly after this first meeting, she helped count \$24,000 which Santiago told her was for Maher. Miss Berrerra and Santiago returned once more to the Brooklyn location where she observed Santiago and Maher in conversation. In 1971 she also went with Santiago to the Bronx where Santiago left her at a restaurant telling her he was going to meet Maher (Tr. 244-61).

New York City Police Department Detective Rubin C. Bankhead testified that in October of 1969 he was engaged in surveillance of the defendant Maher. Detective Bank-

head's report of October 16, 1969, received in evidence as GX 3, showed that on that date he followed Maher to various locations in the Bronx and Yonkers and that at McLean Avenue and the Major Deegan Highway at about 9:50 P.M. he observed Maher in conversation with an unknown male who arrived in a gold Cadillac registered to Doris Olivero, 3801—18th Avenue, Brooklyn, New York. Both the gold Cadillac and Maher's vehicle were later that evening followed to Hughes Avenue and 186th Street in the Bronx (Tr. 261-275).

Bernard Udell, an attorney, testified that in March and April of 1971 he was representing Santiago Olivero and that he and Doris Olivero on one occasion during that period went to a bail bondsman to post Santiago Olivero's bail. He also stated that he was given \$8,000 of that money by Theodore Stein, Robert Maher's attorney.

Detective John Rainey testified that as a result of a conversation with Doris Olivero on February 22, 1971 he began surveillance of the defendant Maher. On March 12, 1971 Maher was operating a crane at a construction site on Gunhill Road in the Bronx, stopping work at one point during the day to meet with Santiago Olivero. Maher was also observed with Santiago Olivero at the site on March 16, 1971. On March 22, 1971, Santiago Olivero, Doris Olivero and an individual named Joaquin Quinones were seen arriving at the site where Santiago left his car and entered the Volkswagen in which Maher was sitting. Santiago handed a brown paper bag to Maher and returned to his car. Santiago and Doris Olivero and Quinones were then followed by Detective Rainey to lower Manhattan.

On March 23, 1971, at about 3:00 P.M. Doris, Santiago Olivero and Quinones again arrived in the area of the construction site and parked behind a car near which Maher was waiting. At that time Detective Rainey and other offi-

ers arrested Doris, Santiago, Quinones and the defendant Maher. Shortly after the arrest, Doris Olivero led Detective Rainey to her residence at 2418 Pitkin Avenue in Brooklyn where she led him to various caches of white powder in the basement and in a soda machine. Field tests performed on the powder indicated that it was in fact heroin. The narcotics were then placed in a shirt box found in the house and delivered to the police laboratory (Tr. 319-33).*

On April 12, 1971 after the arrests on Gunhill Road, Detective Rainey and other officers commenced surveillance of Manhattan Beer Distributors. During the course of the surveillance that day two males were seen in conversation with the defendant Trabacchi. One of the males was observed, through binoculars, passing a large sum of money to Trabacchi and then both left the area. The same two males returned about four hours later, entered Manhattan Beer Distributors and emerged a few minutes later carrying a case of beer. Using his binoculars Detective Rainey could observe one of the males in their car lift up one of the six packs of beer, remove a plastic bag containing white powder, shake the package and then replace it in the beer case, placing the six pack of beer back on top. On April 15, 1971 a male and female drove up to Manhattan Beer Distributors where the male left the car and entered the store. A short time later a young boy came out of the Beer Distributors, went to the male's car, and removed a small paper bag which he took back into the store. Shortly thereafter the male left the store and entered the car where he removed from his jacket a brown paper bag. The male looked inside the bag, and then passed it to the female who also examined the contents of the bag before rolling it up and placing it in

* At trial although Detective Rainey located his initials on the shirt box he was unable to find his initials on the various bags of heroin. As a result Judge MacMahon ruled the heroin inadmissible and instructed the jury to disregard it (Tr. 334-49). Contrary to appellants' assertions the heroin was immediately removed from the courtroom.

the glove compartment. Surveillance was discontinued on April 19, 1971 because Detective Rainey felt that his surveillance team had been discovered (Tr. 349-358; GX 1, 2).

BNDD Special Agent Bernard Coulter testified that on May 26, 1971 while assigned to the San Juan office he received a call from the manager of the Racquette Club Hotel in Esaverde, Puerto Rico. The manager turned over to Agent Coulter a blue cosmetic case containing three plastic bags of white powder which, after being field tested, were found to contain approximately one kilogram of heroin. Agent Coulter then replaced the cosmetic case in the ceiling of Room 525, where it had been found, and took up surveillance. On May 28, 1971, Doris Olivero was arrested as she attempted to retrieve the cosmetic case from the room (Tr. 393-401).

The Defense Case

The defendant Maher took the stand and testified that he was employed by the Underhill Construction Company as a crane operator and that on occasion he also worked at a bar owned by his mother called Dan's Bar & Grill which was on East 186th Street and Hughes Avenue in the Bronx. Maher stated that in 1967 or 1968 he was working on a construction project on 72nd Street and York Avenue in Manhattan. He met Santiago Olivero in that vicinity when on one occasion Olivero's truck got stuck and he helped him start it. Olivero's truck was hauling vending machines at the time. Maher and Santiago became friendly and Maher would from time to time assist Olivero in obtaining concessions for vending machines at the various sites at which Maher worked. Olivero used to visit Maher at these sites and all they would discuss was possible locations for Olivero's vending machines.

Maher testified that when Detective Rainey and Coutsakis arrested him on March 23, 1971 on Gunhill Road they

asked him to "set Olivero up". When he refused the two detectives told him he would be sorry and shortly thereafter the same two detectives arrested him for having stolen plates on his car. His car was then searched and he was further accused of having residue of heroin in his car along with a pistol. Maher denied having the residue or gun in his car and he also denied selling or possessing drugs at any time. He stated that he once was introduced by Santiago Olivero to a girl by the name of Theresa and that one time he mistakenly called Doris Olivero by that name. Doris he stated, began cursing at him and later, at the Brooklyn trial, she had threatened to get him (Tr. 462). Maher also testified that he had never seen Carmen Berrerra prior to her testimony at the trial (Tr. 450-68).

On cross-examination Maher admitted that he had given his attorney \$8,000 for Santiago Olivero's bail in 1971. He also stated that he had not seen his co-defendant Trabacchi since the end of 1967 or the beginning of 1968 and that he had never been to Manhattan Beer Distributors (Tr. 468-76).

The defendant Trabacchi testified that he used to deliver beer to a construction site on York Avenue where he met Maher. He denied knowing Doris or Santiago Olivero and said he had never been to Dan's Bar and Grill in the Bronx (Tr. 420-449).

ARGUMENT**POINT I****The defendant has shown no prejudice resulting from pre-indictment delay or the trial court's denial of a continuance.**

Maher contends that he was severely prejudiced by a pre-indictment delay of some 23 months between the last overt act alleged in the conspiracy count of the indictment and the unsealing of the indictment. He further claims to have been prejudiced by the trial court's refusal to grant a one week continuance first requested on the date of trial. Both contentions are utterly without merit since no showing of prejudice has remotely been made.

It is well recognized that the primary guarantee against pre-indictment delay is the statute of limitations. *United States v. Marion*, 404 U.S. 307 (1971). It is also accepted that in instances of substantial delay-induced prejudice, the Fifth Amendment might provide a defendant with a remedy despite his having been indicted within the applicable period of limitations. *United States v. Capaldo*, 402 F.2d 821, 823 (2d Cr. 1968), *cert. denied*, 394 U.S. 989 (1969). In the present case, the only claim of prejudice is the fading of the memories of government witness. This factor, however, would tend normally to hurt the government's case far more than the defendant's. *United States v. Smalls*, 438 F.2d 711, 713-14 (2d Cir.), *cert. denied*, 403 U.S. 933 (1971); *United States v. Feinberg*, 383 F.2d 60, 65-66 (2d Cir. 1967), *cert. denied*, 389 U.S. 1044 (1968). This is especially true where, as here, Maher's defense to the charges is a blanket denial of participation in the narcotics transactions, a denial of frequenting one of the key locations where it is claimed that he was observed

(Manhattan Beer Distributors), and a denial of knowing a major government eye-witness (Carmen Berrerra).

Maher does not even allege any prejudice in the nature of an inability to locate defense witnesses or to secure evidence. *United States v. Iannelli*, 461 F.2d 483, 485 (2d Cir.), cert. denied, 409 U.S. 980 (1972); *United States v. Scully*, 415 F.2d 680, 683 (2d Cir. 1969); *United States v. Capaldo*, *supra* at 823. The cases relied on by Maher offer him no support given the facts of this case. Indeed, *United States v. Lee*, 413 F.2d 910 (7th Cir. 1968) affirmed a conviction where the defendant alleged that the 21 month pre-indictment delay had seen the death of two important witnesses.

Equally unfounded is Maher's claim that he was prejudiced by the trial court's refusal to grant a continuance to a newly selected attorney who appeared in court for the first time on the scheduled morning of trial. The indictment was filed on October 17, 1973 and on October 23, 1973 Maher appeared with his attorney and pleaded not guilty. The case was assigned to Judge MacMahon and a pre-trial conference was scheduled for October 26, 1973. On that date Maher's counsel was informed that trial would be scheduled for Monday, November 12, 1973. On the morning of trial a Stephen Russo, Esq. informed the court that he had been retained by Maher the preceding Thursday (November 8, 1973) and would be representing Maher at trial. Mr. Russo then asked for a week's adjournment. Judge MacMahon denied the motion and directed that Mr. Victor, Maher's attorney of record, be summoned to court to represent his client. Mr. Victor did appear and Judge MacMahon refused his request to be relieved. Thereafter, Mr. Russo and Mr. Victor were both present during the entire trial.

Moreover, Mr. Victor had been granted access to almost all of the Government's 3500 material a full week prior

to trial and had spent hours reviewing the material and making notes. Mr. Russo had also been granted access to a portion of the 3500 material on the Friday preceding the trial (Tr. 7). In addition, Mr. Russo stated at one point that he was in a better position to try the case than Mr. Victor. In view of all of the circumstances there was no abuse of discretion in Judge MacMahon's denial of Maher's last minute request for an adjournment. *United States v. Rosenthal*, 470 F.2d 837, 844 (2d Cir. 1972), cert. denied, 412 U.S. 909 (1973); *United States ex rel. Baskerville v. Deegan*, 428 F.2d 714, 716-17 (2d Cir.), cert. denied, 400 U.S. 928 (1970).

POINT II

The court's refusal to instruct the jury not to consider the hearsay declarations of co-conspirators on the substantive counts was proper.

During its deliberations the jury sent in a note which read as follows:

"We are tied up on count one, conspiracy. If we cannot come to a decision on count one can we continue on Count 2, 3, 4 and 5?" (Tr. 568).

Defense counsel requested that the court instruct the jury that statements of co-conspirators, admitted as exceptions to the hearsay rule, should not be considered on the remaining counts if the jury was not deliberating on the conspiracy count. Judge MacMahon quite correctly refused to give such an instruction and told the jury to proceed with the other counts and then come back to Count One (Tr. 570).

The law is quite clear that hearsay statements of co-venturers in furtherance of a criminal venture are admissible.

sible even absent a conspiracy charge.* See e.g., *United States v. Berger*, 433 F.2d 680, 683 (2d Cir. 1970), *cert. denied*, 401 U.S. 962 (1971); *United States v. Rinaldi*, 393 F.2d 97, 99 (2d Cir.), *cert. denied*, 393 U.S. 913 (1968); *United States v. Messina*, 388 U.S. F.2d 393, 395 (2d Cir.), *cert. denied*, 390 U.S. 1026 (1968). In this case the non-hearsay evidence conclusively established that Maher regularly supplied heroin to Santiago Olivero. Doris Olivero testified to at least seven or eight occasions on when in her presence Maher delivered heroin to Santiago Olivero and Santiago in turn paid Maher for the narcotics (Tr. 111-125). Maher was observed meeting with Santiago on many occasions by police surveillance officers and when Santiago was arrested in March of 1971 Maher admitted putting up \$8,000 for Santiago's bail (Tr. 265, 324-32, 470). Repetitive joint operations between Santiago Olivero and Maher thus having been established, the hearsay statements, attributed to Maher's co-venturer Santiago Olivero, would have been properly considered by the jury on the substantive counts. *United States v. Lopez*, 420 F.2d 313, 317-18 (2d Cir. 1969); *Ottomano v. United States*, 468 F.2d 269, 273 (1st Cir. 1972), *cert. denied*, 409 U.S. 1128 (1973); *United States v. Pugliese*, 153 F.2d 497 (2d Cir. 1945).

POINT III

Neither the doctrine of collateral estoppel or double jeopardy barred the prosecution of the charges in the indictment.

Subsequent to his arrest by New York City Detectives on March 23, 1971 Maher was indicted by a New York State grand jury sitting in Brooklyn on charges of conspiring with Josquin Quinones and Santiago Olivero to

* Hearsay statements of co-conspirators are of course admissible on substantive counts as well as the conspiracy count. *United States v. Binder*, 453 F.2d 805, 809 (2d Cir.), *cert. denied*, 407 U.S. 920 (1971); *United States v. Branker*, 418 F.2d 378, 380 (2d Cir. 1969).

violate the New York State narcotics laws during the period March 12, 1971 to March 23, 1971 and with possessing, on March 19, 1971, 16 or more ounces of heroin. The state trial against Maher alone before the Honorable Justice McGrover and a jury commenced in January of 1972 in Brooklyn. Doris Olivero testified as a state witness, and the facts she testified to in Brooklyn were essentially the same as she testified to with respect to the transactions forming the basis of Count Five of the present federal indictment.

On January 14, 1972, at the conclusion of the state's case Justice McGrover entered an order dismissing the charges pursuant to Section 290.10 of the New York State Criminal Procedure Law on the grounds that the trial evidence was not legally sufficient to establish the offenses charged.

Maher asserts that his conviction below on Count Five was barred by the double jeopardy clause and alternatively that the government was collaterally estopped from introducing against him the evidence which had been presented at the Brooklyn trial. His arguments are without legal foundation.

First, a prior state trial does not bar a subsequent federal prosecution for the same offense.* *Abbate v. United States*, 359 U.S. 187, 196-201 (1959). Second, a prior state acquittal does not collaterally estop the United States, which was not a party to the prior proceeding, from contesting facts previously determined in the defendant's favor. *United States v. Feinberg*, 383 F.2d 60, 71 (2d Cir. 1967), cert. denied, 389 U.S. 1044 (1968); *United States v. Wapnick*, 198 F. Supp. 359, 360 (E.D.N.Y. 1961) aff'd per curiam, 315 F.2d 96 (2d Cir. 1963), cert. denied, 374 U.S. 829

* It should also be noted that the prior state trial did not involve the crime charged in Count Four of the present indictment.

(1965); *Martin v. Rose*, 481 F.2d 658 (6th Cir.), cert. denied, — U.S. — (1973); *United States v. Smith*, 446 F.2d 200, 202 (4th Cir. 1971); *United States v. Hutul*, 416 F.2d 607, 626, (7th Cir. 1969), cert. denied, 396 U.S. 1007 (1972), reh. denied, 397 U.S. 1081 (1970).

Furthermore, even on the assumption that the federal government was somehow bound by the factual determination of the state court, Maher has utterly failed to meet his required burden of showing what facts, if any, were necessarily determined by the order of dismissal. *United States v. Cioffi*, 487 F.2d 492, 498 (2d Cir. 1973); *United States v. Lopez*, 420 F.2d 313, 317 (2d Cir. 1969). Section 290.10 of the New York State Criminal Procedure Law (CPL) under which the order of dismissal was issued provides that such an order may issue "dismissing any count of an indictment upon the ground that the trial evidence is not *legally* sufficient to establish the offense charged therein or any lesser included offense." N.Y.C.P.L. § 290.10(1) (McKinney 1971) (emphasis added).

Legally sufficient evidence is defined as

"competent evidence which if accepted as true, would establish every element of an offense charged and the defendant's commission thereof; except that such evidence is not legally sufficient when corroboration required by law is absent." N.Y.C.P.L. § 70.10 (McKinney 1971).

Thus, as far as appears from the record, Justice McGrover's order may have been premised on the lack of corroboration of Doris Olivero's accomplice testimony against Maher, rather than any adverse determination of fact with respect to any element of the crime. See N.Y.C.P.L. § 60.22 (McKinney 1971).

Finally, Maher argues that the failure of the Government to obtain prior approval of the Department of Justice pur-

suant to a 1959 Department of Justice policy declaration before commencing this prosecution requires that his conviction be reversed. The argument is without merit. First the policy declaration of former Attorney General Rogers created no legal defense for an accused. *United States v. Hutul, supra* at 627. The three cases cited by Maher all involved Government initiated motions to dismiss and not court enforcement, against the wishes of the Government, of the Rogers policy declaration. In addition, the three cases all involved successive federal prosecutions, not federal prosecutions following prior state proceedings. Thus the policy embodied in seeking voluntary dismissal in those cases was merely a federal interest in consolidating in a single federal prosecution offenses arising out of a single episode—not a relinquishment of the power, as a separate sovereign, to prosecute violations of federal law after a prior state proceeding arising out of the same transaction. It is significant in this regard that Congress chose in the 1970 narcotics law revisions to maintain and expand the concurrent federal jurisdiction over narcotics crimes. See Drug Abuse Prevention and Control Act, 84 Stat. 1242, 21 United States Code, Sections 801 et seq.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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Southern District of New York,
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AFFIDAVIT OF MAILING

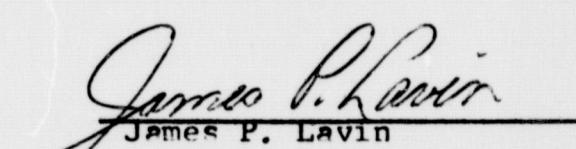
State of New York)
: ss.:
County of New York)

James P. Lavin being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

That on the 1st day of March, 1974
he served a copy of the within Appellant's brief (3)
by placing the same in a properly postpaid franked
envelope addressed:

Gustave H. Newman, Esq.
522 Fifth Avenue
New York, N.Y. 10036

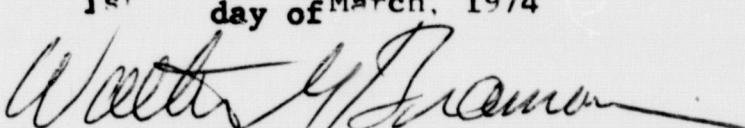
And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.



James P. Lavin

Sworn to before me this

1st day of March, 1974



WALTER G. BRANNON

WALTER G. BRANNON
Notary Public, State of New York
No. 24-0394500
Qualified in Kings County
Cert. filed in New York County
Term Expires March 30, 1975